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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 212

CRANE CO.,

Petitioner,

—v.—

WESTINGHOUSE AIR BRAKE COMPANY, A. KING MCCORD, EDWARD J. HANLEY, EDWIN HODGE, JR., FRANK L. MAGEE, JOHN A. MAYER, G. ALBERT SHOEMAKER, ERIC L. WALKER, LAWRENCE E. WALKLEY, JAY V. WILCOX, LESLIE B. WORTHINGTON, AMERICAN STANDARD and BLYTH & CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY PURSUANT TO RULE 24(4) ON THE ISSUE OF TIMELINESS

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July 8, 1970

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Respondents argue that petitioner's petition for a writ of certiorari was filed too late to give this Court jurisdiction. There are two separate and independent grounds why the petition for certiorari is not late: (1) it was filed within ninety (90) days of the Court of Appeals' denial of a *timely* petition for rehearing; and (2) the issues to which it is addressed are inextricably linked with those posed by the petition for rehearing.

First: Standard's timely petition for rehearing on the manipulation issue tolled the time for Crane to petition for certiorari on the issues encompassed within its certiorari petition.

It is settled that the time to petition for certiorari begins to run from the date of the denial of a timely petition for rehearing.

> "Where a timely motion is filed, the time in such cases runs from the date of the order overruling the motion. See *Department of Banking* v. *Pink*, 317 U.S. 264, 266 (1942); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 177 (1944); *Foreman* v. *U. S.*, 361 U.S. 416 (1960)." *United States* v. *Adams*, 383 U.S. 39, 41, fn. 1 (1966).

The filing of the petition for rehearing suspends the finality of the judgment. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

Here the Court of Appeals entered a single judgment on December 10, 1969* on an appeal from a final judgment of the District Court dismissing Crane's consolidated complaint against all defendants. Pet. p. 62a. Crane did not, as Individual Respondents' Brief asserts (p. 7), file "four separate appeals." A single notice of appeal was filed by Crane on June 21, 1968 from the final judgment of the District Court. R. 47. Crane's two complaints, both of which attacked the proposed merger of Air Brake into Standard had been consolidated "for all purposes" by the District Court on May 14, 1968. R. 24. Standard's peti-

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* Although the judgment was entered on December 10, 1969, the mandate of the Court of Appeals pursuant to Rule 41(a) of the Rules of Appellate Procedure did not issue to the District Court until after the denial of the rehearing petition. Thus the Court of Appeals treated the entire judgment as a single entity.

tion for rehearing was filed within the allowed fourteen days.

The effect of the rehearing petition was to enable the Circuit Court, if it so desired, to review the entire judgment, not just the portion on which rehearing was sought. *Continental Cas. Co.* v. *American Fidelity & Cas. Co.*, 186 F. Supp. 173, 178-180 (S.D. Ill., 1959), *aff'd*, 275 F.2d 381 (7th Cir., 1960); *United States* v. *Bentley & Sons Co.*, 293 Fed. 229, 237 (E.D. Ohio, 1923); *United States Nat. Bank* v. *Great Western Sugar Co.*, 60 Mont. 342, 351-52, 199 P. 245, 248 (1921); *Conway* v. *Fabian*, 108 Mont. 287, 321-22, 89 P. 2 1022, 1036 (1939); *Colesar* v. *Star Coal Co.*, 255 Ill. 532, 544, 99 N.E. 709, 714 (1912); *Bergman* v. *Board of Education*, 30 Ill. App.2d 65, 68-69, 173 N.E.2d 565, 567 (1961). Accordingly, Standard's petition for rehearing filed on December 24, 1969 suspended in all respects the finality of the December 10, 1969 judgment of the Court of Appeals. Therefore, Crane's time to petition for certiorari was tolled on all issues encompassed by the December 10, 1969 judgment until the denial of Standard's petition for rehearing on March 4, 1970. *United States* v. *Adams, supra.*

Respondents' reliance on *FTC* v. *Minneapolis Honeywell Co.*, 344 U.S. 206 (1952) is misplaced. In that case the petitioner's application to modify the Circuit Court's judgment was *not timely*. Accordingly, it could not operate to suspend any part, let alone all, of the Circuit Court's judgment.

Second: The issues raised by Crane's petition for certiorari are "inextricably linked" with the issues raised by Standard's rehearing petition.

In *United States* v. *Adams*, *supra*, this Court ruled that where issues raised by a petition for rehearing or motion to amend or modify a judgment are inextricably linked with issues raised by a petition for certiorari, the latter is timely if filed within 90 days of the lower court's disposition of the rehearing petition. In the *Adams* case, this Court distinguished its decision in *Minneapolis-Honeywell* as follows:

> "[F]irst, because that case did not involve a timely motion to amend the judgment and, secondly, because here the Government's liability was inextricably linked with the alleged contract action which was not determined until the latter judgment." 383 U.S. at 41-42 (footnote omitted).

Here the challenge to the Air Brake/Standard merger on the ground of the misleading character of the Air Brake proxy statement is inextricably linked to the challenge to the same merger on the ground of the manipulation of Air Brake stock on April 19, 1968. Both grounds directly concern steps essential to the consummation of the merger of Air Brake into Standard.* Moreover, one of the grounds on which the Air Brake proxy statement was claimed to be deficient lay in its failure to reveal the transactions in Air Brake stock which constituted the illegal manipulation. Clearly review of the question of the materiality of

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* After consummation of the merger on June 7, 1968, Standard is the party responsible for all defects in the Air Brake proxy statement. To this extent, Crane's proxy claims and its manipulation claims are against the same defendant, Standard.

Air Brake's failure to inform its shareholders of the transactions constituting the manipulation of Air Brake stock should await the Court of Appeals ruling on the petition for rehearing challenging its decision that these transactions were manipulative. In the absence of a finding of manipulation, there clearly could be no violation of the proxy rules in the failure to disclose the transactions upon which the claim of manipulation was based.

Individual Respondents' brief in opposition to Crane's petition for certiorari attempts to avoid the linkage between the manipulation on April 19th, and the omission of all reference thereto in the Air Brake proxy statement, by asserting that Crane did not contend below that the Air Brake proxy statement was deficient in omitting any reference to the manipulative wash transactions in Air Brake stock on April 19. Individual Respondents' assertion is incorrect and is contrary to the record. Crane contended before the District Court that the Air Brake proxy statement was deficient in not revealing that Standard was selling as well as purchasing Air Brake shares.* R. 41, ¶5. Crane also argued before the District Court that the Air Brake proxy statement was deficient in not revealing the manipulative transactions in Air Brake stock; the District Court in its opinion expressly acknowledged these contentions of Crane.** Pet. p. 37a. Crane in its

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* The manipulation consisted of Standard selling secretly 120,000 shares of Air Brake on the same day it purchased 170,000 shares of Air Brake at a loss of one-half million dollars. Ex. 30; R. 56, p. 572.

** At the close of all the proof at the trial, Crane moved to amend the pleadings to conform to the proof. The District Court stated this would not be necessary for "In Federal Court all pleadings are deemed to be amended to conform to the proof." R. 51, p. 881.

brief to the Court of Appeals argued that Air Brake's proxy statement was deficient in omitting reference to the manipulative transactions in Air Brake stock. (See pages 78-79 of Crane's Brief to the Court of Appeals, attached hereto as Appendix A.) The record established and the Circuit Court found that:

> "Standard was an 'insider' with respect to the trading of Air Brake stock. Standard was acting in concert with the Air Brake management, with whom it was on the verge of consummating a merger. Standard regularly and systematically informed the Air Brake management of its transactions in Air Brake's stock." * Pet. p. 15a.

In the face of this express finding by the Court of Appeals, there is simply no basis whatsoever for the Individual Respondents' assertion at page 12 of their brief that Crane's claim that "Air Brake knew about the manipulative inflation of the price of Air Brake" was "an unfounded allegation."

Obviously Air Brake is responsible for the deficiencies in *its* proxy statement. Particularly is this so where Air Brake had knowledge of, and was *particeps criminis* in the manipulative transactions. Individual Respondents' contention in their brief that Crane had not contended that Air Brake was responsible for its failure to inform its

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* Individual Respondents' statement in their brief that "there is no proof that the proxy defendants had any complicity in or knowledge of the market manipulation" (Individual Respondents' brief, p. 11) is totally incorrect.

shareholders of the manipulative transactions is simply frivolous.

There can be no question that not only should Air Brake have informed its shareholders of the manipulative transactions, but this issue on certiorari is inextricably linked to the issues to which the rehearing petition was directed.

These are not the only respects in which Individual Respondents' brief is in error. At page 12 it claims that Crane could have protected itself by filing a petition for certiorari within 90 days after December 10, 1969. We have shown above that this contention is without substance on two separate and independent grounds: (1) the effect of the filing of a timely petition for rehearing and (2) the inextricable link between the rehearing issues and the certiorari issues. Moreover, Individual Respondents' contentions, if adopted by this Court, would lead to the multiplication, in many cases, of the number of petitions and briefs filed with this Court. It would force an aggrieved party to file its petition for certiorari before it knew for certain what the Court of Appeals judgment had determined. For example, Crane would be obliged to file a certiorari petition to review the proxy rulings before it knew whether to include within the scope of its petition a possible adverse decision on the manipulation claim after rehearing. This could require two petitions to review a single judgment.

Wherefore, it is respectfully submitted that Crane's petition was timely and that a writ should issue vacating that part of the judgment below which affirmed the dismissal of Crane's consolidated complaint and remanding the case

to the Court of Appeals for further consideration in light of *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

Respectfully submitted,

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APPENDIX A

Crane's Brief in the Court of Appeals, pages 78-79

Third: The non-disclosure of the manipulative transactions was a material omission under Rule 14a-9.

Air Brake's proxy statement was designed to induce the Air Brake stockholders not to tender their Air Brake stock and to vote for the Standard merger. The Air Brake stockholders were given a "WARNING" against tendering to Crane and were told that an independent consultant had advised against the Crane merger. Standard's manipulation of the market price was for the same purpose, i.e., to deter the Air Brake shareholders from tendering their stock to Crane.

Rule 14a-9 requires a disclosure of any material fact "necessary to correct any statement in any earlier communication." Here the proxy statement published during the week of April 8th innocuously recited at page 6 that Standard "may purchase for cash WABCO common stock over securities exchanges or otherwise from time to time." The stockholders were never informed of Standard's manipulation of the market in Air Brake stock. Disclosure of the fact that Standard's management, with Air Brake's knowledge, found it necessary to resort to illegally inflating the market price for the Air Brake stock at a cost of over one-half million dollars to deter tenders to Crane could and would have had a substantial influence on an Air Brake shareholder's choice of alternatives. The very fact that an illegal device was used against the Crane exchange offer would affect a stockholder's judgment as to

the integrity of management and the validity of its recommendations. (See *SEC* v. *Capital Gains, supra.*) The very fact that such means at a cost of one-half million dollars—and moneys of the entity to be merged—were employed against the Crane exchange offer would suggest that Standard's and Air Brake's management did not dare rest on the respective merits of the two competing offers to the Air Brake shareholders. The importance of disclosing that a market price is a product of manipulation has been emphasized by the SEC in *Russell Maguire Co. Inc., supra.* There it was held that a failure to disclose that the market price at which stock had been sold was the product of illegal manipulation was a material omission in violation of Section 17a of the 1933 Act, the prototype for Rule 10b-5.

Fourth: The District Court's decision

The District Court made no mention in its opinion of Standard's manipulation of the price of Air Brake stock.